UNITED STATES GOVERNMENT

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

RES-CARE, INC. d/b/a TREASURE ISLAND JOB CORPS CENTER
and ALUTIIQ PROFESSIONAL SERVICES, LLC [1]

Joint-Employers

and Case 20-RC-17984

CALIFORNIA FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that that Res-Care Inc. d/b/a/ Treasure Island Job Corps Center (Res-Care) operates a Job Corps facility at Treasure Island, California, where it provides educational and job-training services to at-risk youth, under

[1] The names of the Joint-Employers appear as described in the registration records of the Secretary of State of the State of California.

a contract with the United States Department of Labor (DOL). Res-Care has subcontracted some of the services it provides at the Treasure Island Job Corps facility to Alutiiq Professional Services, LLC (Alutiiq). Alutiiq primarily provides teaching services under its contract with Res-Care. The parties stipulated, and I find, that Res-Care and Alutiiq are joint employers of Alutiiq's employees for purposes of this proceeding. The parties further stipulated, and I find, that during the 12-month period preceding the filing of the petition in this case, Res-Care purchased and received goods and services valued in excess of $50,000 directly from points located outside the State of California. They also stipulated, and I find, that during this period, Res-Care derived gross revenues in excess of $1,000,000 and that Alutiiq provided services valued in excess of $50,000 to Res-Care at the Treasure Island facility. In addition to these stipulated facts, I take administrative notice that Res-Care is registered with the California Secretary of State as a Kentucky corporation and Alutiiq is registered with that entity as an Alaska corporation. In view of the foregoing, I find that Res-Care and Alutiiq are each engaged in commerce within the meaning of the Act.

Res-Care and Alutiiq, collectively herein called the Joint-Employers, contend that they are exempt from the Board's jurisdiction because of the control exerted over their operations and labor relations decision-making by the DOL, which prevents them from being able to engage in meaningful collective bargaining with the Petitioner. In this regard, the Joint-Employers request that I overrule the Board's decision in *Management Training Corp.*, 317 NLRB 1355 (1995), and return to the standard previously applied by the Board in *Res-Care,* 280 NLRB 670 (1986). For the following reasons, I decline to

dismiss the petition and find that the Board has jurisdiction over Res-Care and Alutiiq both as individual employers and as joint employers of Alutiiq's employees.

Facts. The parties stipulated, and I find, that the manner in which the Treasure Island Job Corps Center is administered by the DOL is similar in all respects to the factual determinations made by the Board in *Res-Care, Inc. v. Indiana Joint Board, Retail, Wholesale And Department Store Union, AFL-CIO,* 280 NLRB 670 (1986). This stipulation does not, however, include the legal determinations made by the Board or the Board's interpretation of federal law, but, rather, only the factual determinations made in that case. The parties also stated on the record that they were prepared to stipulate on a non-precedential basis that for purposes of this litigation, they are joint employers of the employees employed by Alutiiq at the Treasure Island facility. The record contains no additional relevant evidence concerning whether the Joint-Employers' operations are subject to the Board's jurisdiction other than the foregoing stipulations.

Analysis. In *Management Training Corp*., 317 NLRB 1355, 1358 (1995), the Board adopted the following two-prong test to determine whether it would assert jurisdiction over private sector employers with close ties to an exempt government entity: (1) Does the employer meet the definition of "employer" under Sec. 2(2) of the Act? and (2) Does the employer meet the Board's statutory and monetary jurisdictional standards? The Board also held that it would not analyze whether a private sector employer is a joint employer with the exempt government entity in order to determine jurisdiction. *Id*. at 1358 fn. 16. In so doing, the Board reasoned that although it has no jurisdiction over a government entity and cannot compel it to sit at the bargaining table, a private employer

is capable of engaging in effective bargaining regarding terms and condition of employment within its control. *Id*. at 1358, fn. 16.

In *Management Training*, the Board overruled its decision in *Res-Care, Inc.*, 280 NLRB 670 (1986), and rejected the test adopted therein pursuant to which the Board examined the control over essential terms and conditions of employment retained by both the employer and the exempt government entity and determined whether the employer is capable of engaging in meaningful collective bargaining.[2] In so doing, the Board described the *Res-Care* test as "unworkable and unrealistic." Id. 317 NLRB at 1355. The Board recently reaffirmed *Management Training* and rejected a return to the *Res-Care* standard in *In re Jacksonville Urban League, Inc.*, 340 NLRB No. 156 (December 18, 2003). The Sixth, Fourth, and Tenth Circuits have upheld the *Management Training* doctrine. *Pikeville United Methodist Hospital of Kentucky v. NLRB,* 109 F.3d 1146 (6th Cir. 1997); *Teledyne Economic Development v. NLRB,* 108 F.3d 56 (4th Cir. 1997); and *Aramark Corp. v. NLRB,* 156 F.3d 1087 (10th Cir. 1989). The Joint-Employers urge that I overrule *Management Training* and apply the *Res-Care* test to the instant proceeding. However, the only evidence they proffer for this proposition is the above-noted

[2] In *Res-Care*, the Board declined to assert jurisdiction over the employer, which operated a residential job corps center in Indiana under contract with DOL, finding that DOL imposed direct control over the Employer's wages and benefits by the requirement that DOL approve the employer's initially submitted budget; approve the employer's wage ranges, sick leave and vacation pay; and approve any changes in wage and benefit levels that had been previously approved by DOL. In that case, the Board noted that DOL required that the employer's wage rates be based on area standards and not exceed by 10% or more what the employees received in their former positions. Because of these direct controls over wages and benefits exerted by DOL in *Res-Care*, the Board concluded in that case that DOL's control over such essential terms and conditions of employment made meaningful collective bargaining by the employer impossible, and it declined to assert jurisdiction over the employer. The parties in this case, as set forth above, have stipulated that the manner in which the Treasure Island Job Corps Center is administered by DOL is similar in all respects to the factual determinations made in *Res-Care*.

stipulation that the facts of this case are similar in all respects to those in *Res-Care*, the case in which the Board specifically overruled in *Management Training.* The Joint-Employers stipulated that they satisfy the Board's discretionary jurisdictional standards and do not contest their status as employer under the Act. Rather, they repeat primarily the same arguments as were asserted in *Res-Care* to show the degree of control exercised over their operation by the DOL.

I am obliged to apply current Board law, which is set forth in *Management Training,* and reaffirmed by the Board in *In re Jacksonville Urban League, Inc.* To the extent the Joint-Employers have raised any new legal arguments to challenge that precedent, it is within the Board's authority and not mine to address them in the first instance.[3] I find that the assertion of jurisdiction over Res-Care and Alutiiq as individual

[3] One argument advanced by the Joint-Employers that was not made in *Res-Care* is that the Board should decline to exercise jurisdiction over Job Corps programs such as that of the Joint-Employers' because the statutory scheme under which *Res-Care* was decided has changed. Specifically, the Joint-Employers assert that *Res-Care* was decided in 1986 under the Job Training Partnership Act (JTPA), and the implementing regulations of the DOL under the JTPA required contractors to establish labor relations in accordance with the NLRA. However, the JTPA has since been replaced by a new statute, the Workforce Investment Act (WIA), under which there are no similar regulations regarding the applicability of the NLRA.

In this regard, I note that Congress passed the WIA in 1998 (29 USC Sections 2801-2945 (2003)) to provide workforce investment opportunities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the nation. 29 U.S.C. § 2811. To be eligible to receive federal funds under the WIA, a state must submit a state plan outlining a five-year strategy for the statewide workforce investment system. The WIA requires the governor of each state to establish a state Workforce Investment Board (WIB) to assist in the development of a state plan. 29 U.S.C. §§ 2821-2822. See *Santana v. Calderon*, 342 F.3d 18 fn 5 (1st Cir. 2003). WIA provides in part that recipients of funds under the WIA must provide assurances that none of the funds will be used to "assist, promote, or deter union organizing." While it is true that the WIA does not expressly provide for the establishment of labor relations under the NLRA, there is no express provision in it indicating that the NLRA is no longer applicable to such operations. In this regard, I note that the Ninth Circuit recently observed that nothing in the federal program grant restrictions of the WIA "intended to alter or actually did alter the 'wider contours of federal labor

employers as well as over the Joint-Employers is clearly warranted, and I decline to dismiss this petition.

Accordingly, I conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The Joint-Employers contend that the petition should be dismissed because it would join together in a single unit, employees of a user employer (Res-Care) and a supplier employer (Alutiiq) without the consent of either.[4] In this regard, the Joint-Employers asserted on the record that neither Res-Care nor Alutiiq agree to the inclusion

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policy.'" *Chamber of Commerce of U.S. vs. Lockyer*, 364 F.3d 1154 (9th Cir. 2004). In *Lockyer*, the Ninth Circuit ruled that a California statute that forbade the use of state funds or property to assist promote or deter union organizing was preempted by the Act. In any event, such an issue is for the Board to decide. Furthermore, as the Board observed in *Management Training Corp*., 317 NLRB at 1358, the Service Contract Act, which applies to all contracts in excess of $2,500 entered into for the principal purpose of providing services to the Federal government, "more than contemplates collective bargaining," since it provides that the DOL will issue area-wage determinations that set forth minimum wages and benefits to be provided to employees of service contractors in particular localities but where wages and benefits are established in collective-bargaining agreements, those rates are to be substituted for the prevailing compensation rates set forth in such wage determinations. 41 U.S.C. Section 351 and Section 4(c), 41 USC Section 353 (c).

[4] Although the Joint-Employers couch their argument for dismissal of the petition because of their lack of consent in terms of the inappropriateness of the unit, the proper analytical framework for this issue is whether there is a statutory bar to the processing of this petition because of the joining of the employees of a supplier and a user employer without the consent of the supplier employer. See *Trumbull Memorial Hospital and Western Reserve Personnel, Inc*., 338 NLRB No. 132 at fn 2 (April 3, 2003). The Joint-Employers do not contend that the employees in the stipulated unit classifications lack a community of interest. Rather, they argue only that substitute instructors and substitute residential advisors should be excluded from the unit as casual employees who lack a community of interest with the full-time and regular part-time employees in the same stipulated unit classifications.

of their respective employees in the same unit for collective bargaining purposes.[5] The Petitioner takes the opposite view.

In making this argument, the Joint-Employers request that I overrule controlling Board precedent, as set forth in *M.B. Sturgis, Inc*., 331 NLRB 1298 (2000). In *Sturgis,* the Board held that the Act does not prohibit the joining together in a single unit the employees of a user-employer and the employees jointly employed by a user-employer and a supplier-employer without the consent of the supplier-employer. *Laneco Construction Systems, Inc*., 339 NLRB No. 132 slip op. (August 21, 2003). Here, the parties have stipulated that Res-Care and Alutiiq are joint employers of Alutiiq's employees, but do not contend that the petitioned-for unit is inappropriate based on community of interest factors. Thus, while the Joint-Employers contend that the employees of Res-Care and Alutiiq should be in separate units, it does so only on the basis of lack of consent by either Res-Care or Alutiiq to the inclusion of their respective employees in a single unit and its argument that *Sturgis* should be overturned. The parties have stipulated to a unit which includes various job classifications though the stipulation requires a separate unit for each of the joint employers. The Joint-Employers have raised no argument and presented no evidence with regard to the lack of a community of interest among the classifications in the stipulated unit, except to the extent that they argue that substitutes for certain positions should be excluded from the unit as

[5] Both Res-Care and Alutiiq were represented at the hearing by the same attorney.

casuals.[6] Given the stipulated unit description, and the lack of any contention or evidence with regard to a lack of a community of interest among the employees in the stipulated unit, I am compelled by the Board's decision in *Sturgis* to reject the Joint-Employers' contention that the unit sought herein is inappropriate because neither Res-Care nor Alutiiq has consented to it. Accordingly, I decline to dismiss the petition based on the refusal of either Res-Care or Alutiiq to consent to the inclusion of their employees in the same unit.[7]

5. The parties stipulated that employees in the following classifications employed by either employer would constitute an appropriate unit:

> All full-time and regular part-time employees in the classifications of college program coordinator, instructor, residential advisor, senior residential advisor, administrative assistant, recreation specialist, career transition specialist, counselor, center protection officer,[8] driver, outreach and admissions specialist, testing specialist, STARS specialist, information technology specialist, career preparation specialist, student government advisor, finance specialist, finance clerk, purchasing department employee, record specialist, accountability and attendance specialist, facilities maintenance employee, food service department employee, property staff employee, center standards staff employee, and receptionist; excluding all other employees, managerial employees, confidential employees, guards and supervisors as defined by the Act.

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[6] As addressed below, although the Joint-Employers raise the issue of whether the substitute instructors and substitute resident advisors should be included in the unit, which includes full-time and regular part-time employees in these classifications, and the Joint-Employers argued that the substitutes lacked a community of interest, this argument dealt only with the issue of whether the substitutes should be excluded from the unit as casual employees.

[7] No party contends that there is a contract bar to this proceeding. At the hearing, the Petitioner's attorney asserted that his law firm also represents Teamsters Union Local 856, which represented the employees of the Joint-Employers' predecessor. He also averred that he had been authorized to speak on behalf of Teamsters Local 856 and state that it had received notice of the hearing in this case, had no claim of interest in representing the petitioned-for employees, and that it would not be participating in these proceedings.

[8] The parties stipulated, and I find, that the center protection officers are not guards within the meaning of the Act.

The stipulated unit consists of approximately 135 employees.

The Substitute Instructors and Resident Advisors. As noted above, the Joint-Employers contend that substitute instructors and substitute residential advisors should be excluded from the unit on the basis that they are casual employees who do not share a community of interest with the regular full-time employees. The Petitioner would include in the unit those substitute instructors and residential advisors who worked an average of one eight hour shift per week during a representative period of time from the filing of the petition up to the issuance of the eligibility list in this matter. For the reasons discussed below, I find that substitute instructors and substitute residential advisors should be allowed to vote if they meet the eligibility standard set forth in *Davison-Paxon,* 185 NLRB 21 (1970).

Facts. In the Joint-Employers' operation, the instructors teach courses or provide job training to participants in the Joint-Employers' program. The instructors are required to have a college degree and a State of California teaching credential. The job of the residential advisors is to monitor the 650 trainee/students during non-instructional hours. These trainee/students live in dormitories, which are segregated by gender. There is no showing that the residential advisors are required to have any advanced degrees or certifications.

The Joint-Employers maintain a list of substitute employees for instructors and residential advisors. The record indicates that at the time of the hearing, there were

approximately 17 individuals on the substitute instructor list and 8 individuals on the residential advisor substitute list.

The Joint-Employers take applications for substitute positions and conduct a background check, which consists of an examination of references, a drug screen and fingerprinting of the applicant. The Joint-Employers' regular full-time instructors and residential advisors must also undergo the same background check process.

In hiring substitute instructors, the Joint-Employers seek applicants with the same academic or vocational qualifications as regular full-time instructors. When they replace a particular instructor who is absent, they seek a substitute who has similar experience in the area being taught. However, the record reflects that in emergency situations, the Joint-Employers sometimes hire substitute instructors who do not have a teaching certification. In such cases, the Joint-Employers require the substitute instructor to obtain an emergency teaching credential, pursuant to which he or she is required to obtain a regular teaching credential within a year.

When planned events such as vacations or doctor's appointments or unplanned events, such as illness, cause a full-time instructor or residential advisor to be absent, the Joint-Employers fill the position using their substitute lists. The record discloses that the Joint-Employers utilize their substitutes more commonly in planned absence situations because the Joint-Employers use substitutes only when they can fill in an entire shift and this is often difficult to do when a regular instructor or residential advisor calls in sick on the same day the substitute is needed.

When a substitute is needed, a manager of the Joint-Employers calls a substitute on the list and ask him or her to fill the vacancy. Substitutes may refuse a request to fill in on a shift without consequence. However, if the Joint-Employers do not use a particular substitute during a quarter, they contact the substitute and ask if he or she is still interested in being on the substitute list. If the substitute responds in the negative, he or she is removed from the list.

The substitute instructors and residential advisors perform the same work duties as the full-time instructors and residential advisors. They are also required to fulfill the same mandatory training requirements as the regular full-time employees in their respective positions, which includes taking first-aid and CPR courses. If a substitute fails to attend a mandatory training, he or she is removed from the substitute list. The record reflects that the substitutes are also expected to maintain the same certifications required for employees in the positions for which they substitute.

The substitute instructors and residential advisors are not paid at the same rate of pay as the full-time employees in those positions and they do not receive benefits. The record does not disclose the difference in the pay rates of the substitutes as compared to the full-time employees in those positions. The substitutes work during the same work hours as the full-time employees for whom they substitute. That is, the full-time instructors work from 7:45 a.m. to 4:30 p.m., and the full-time residential advisors work on four shifts to cover from 3 p.m. to 8 a.m. on weekdays and 24 hours a day on weekends. The substitute instructors and residential advisors cover whatever shift is left vacant by the absent instructor or residential advisor.

The record reflects that during the 12-week period preceding the hearing, most of the substitute instructors and resident advisors on the Joint-Employers' lists of substitutes worked an average of four hours a week.[9]

Analysis. As indicated above, the Joint-Employers contend that the substitute instructors and substitute residential advisors should be excluded from the unit because they are casual employees who do not share a community of interest with the regular full-time employees. The Petitioner seeks to include in the unit those substitute employees who worked an average of one eight-hour shift per week during a representative period of time from the filing of the petition up to the issuance of the eligibility list in this matter. For the reasons discussed below, I have decided to apply the *Davison-Paxton*[10] eligibility formula in this case

The test used by the Board to determine whether an employee is a regular part-time employee or a casual employee involves the examination of such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions. *Steppenwolf Theatre Co*., 342 NLRB No. 7 (June 18, 2004); *New York Display & Die Cutting Corp*., 341 NLRB No. 121 (May 21, 2004); *Arlington Masonry Supply, Inc*., 339 NLRB No. 99

[9] The seventeen substitute instructors worked the following numbers of hours during the 12 weeks preceding the hearing in this case: Barrett 136 hours; Beck, 129 hours; Bells, 64 hours; Carpentry, 10; Christensen, 104; Foreman, 24; Hayes, 0; Herr, 112; Hoffman, 41; Mitchell, 275.5; Nickelson, 328; Parish, 168; Simonson, 168; Smith, 366; Sternum, 0; Tatum, 64; Tolbert, 174. The eight substitute residential advisors worked the following number of hours during the 12 weeks immediately preceding the hearing: Robinson, 222.25 hours; Henderson, 418; Hopkins, 89.25 hours; Pineda, 307 hours; Terry, 420.5 hours; Osborne, 43.5 hours; Orozo, 102.5 hours; and Turner, 278 hours.

[10] 185 NLRB 21 (1970).

(July 21, 2003); *Muncie Newspapers*, Inc., 246 NLRB 1088, 1089 (1979); *Pat's Blue Ribbons*, 286 NLRB 918 (1987). As stated by the Board in *Pat's Blue Ribbon*: "In short, the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Id.*

In determining whether on-call employees who perform unit work should be included in a bargaining unit, the Board considers the regularity of their employment. Employees are considered to have been regularly employed when they have worked a substantial number of hours within the period of employment prior to the eligibility date. Under the Board's longstanding and most widely used test for voter eligibility as set forth in *Davison-Paxon*, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages four or more hours of work per week for the last quarter prior to the eligibility date. Thus, under *Davison-Paxon*, "any contingent or extra employee who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election." *Id.* at 24. Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula is the one most frequently used, absent a showing of "special circumstances." *Saratoga County Chapter NYSARC, Inc.,* 314 NLRB 609 (1994).

In the instant case, the record shows that the substitute instructors and residential advisors are required to undergo the same background check as the regular full-time employees, possess and maintain the same certifications, and undergo the same

mandatory training. The substitutes perform the same job duties as the regular full-time instructors and residential advisors, and they do so during the same hours at the same location as the regular full-time employees. The record reflects that most of the substitute employees at issue worked at average of at least four hours per week during the quarter prior to the hearing in this case. In this regard, the record discloses that 12 of the 17 substitute instructors and 7 of the 8 substitute residential advisors on the Joint-Employers' substitute lists worked an average of at least four hours per week during this period. In these circumstances, I see no reason to deviate from application of the Board's standard formula for determining the eligibility of on-call employees. Accordingly, I will apply the *Davison-Paxon* eligibility formula in this case.

In reaching this conclusion, I have carefully considered the Joint-Employers' arguments, but do not find them persuasive. The Joint-Employers contend that they have demonstrated "special circumstances" which require the exclusion of the substitute employees from the unit. Specifically, the Joint-Employers assert that how frequently a substitute works "depends on the irregular, sporadic and unpredictable occurrence of several distinct events." These events include an event such as an illness or absence that gives rise to the need for a substitute; a substitute having the same specialty as the absent instructor; the Joint-Employers deciding to use a substitute; the Joint-Employers contacting the substitute; and the substitute actually accepting the job. Because how frequently substitutes work depends on these various "irregular, sporadic and unpredictable" circumstances, the Joint-Employers argue that no single time frame can be used to adequately determine eligibility. The Joint-Employers assert that it is therefore

more equitable to exclude all of the substitute employees rather than to allow some but not all of them to vote.

However, the Joint-Employers' assertions in this regard reflect circumstances no different than those typically present in most situations where on-call employees are at issue. See e.g., *Saratoga County Chapter NYSARC, Inc*., *supra.*[11] Thus, on call employees are typically used on an as needed basis to cover unplanned absences and they can decline offers of substitute work without consequences. Further, the wages and fringe benefits of substitute employees are often lower than those of regular full-time employees. The instant case does not involve the type of "special circumstances" (i.e., specialized industries or seasonal businesses) where unique factors exist that render the standard eligibility formula incapable of accurately showing the connection of on-call employees to employees in a petitioned-for unit requiring the use of an alternative eligibility formula to ensure the maximum enfranchisement of employee voters.[12]

In view of the foregoing, I reject the Joint-Employers' contention that substitute instructors and residential advisors must be excluded from the unit and I reject the

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[11] In *Saratoga*, the on-call substitute drivers were employed on an as-needed basis to cover for planned and unplanned absences of regular drivers, they could decline work opportunities without consequence and there was no guarantee of work opportunities made to them. The on-call drivers received no fringe benefits and worked at the lowest wage rate maintained by the Employer with no wage increase for seniority. Nevertheless, the Board determined their eligibility using the *Davison-Paxton* formula.

[12] See, e.g., *DIC Entertainment*, supra (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 1 year period); *Juilliard School*, 208 NLRB 153 (1974) (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 2 year period); *American Zoetrope Productions*, 207 NLRB 621 (1973) (employees eligible where they worked two productions during the past year); *Medion, Inc*., 200 NLRB 1013 (1972) (employees eligible where they worked two productions for 5 days over 1 year*);*and *C.T.L. Testing Laboratories*, 150 NLRB 982 (1965) and *Daniel Ornamental Iron Co.,* 195 NLRB 334 (1972), both of which addressed the status of casual employees in a seasonal industry in which peaks and valleys of overall employment are the norm.

Petitioner's argument that a modified eligibility formula be used in this case. I find that the *Davison–Paxon* formula is the proper formula to apply in the absence of special circumstances warranting a different formula. Accordingly, I will apply the *Davis-Paxon* formula to determine the voter eligibility of the substitute instructors and residential advisors.

Accordingly, for the reasons discussed above, I find that the following unit is an appropriate unit for collective-bargaining purposes: [13]

> All full-time and regular part-time employees in the classifications of college program coordinator, instructor, residential advisor, senior residential advisor, administrative assistant, recreation specialist, career transition specialist, counselor, center protection officer, driver, outreach and admissions specialist, testing specialist, STARS specialist, information technology specialist, career preparation specialist, student government advisor, finance specialist, finance clerk, purchasing department employee, record specialist, accountability and attendance specialist, facilities maintenance employee, food service department employee, property staff employee, center standards staff employee, and receptionist employed by Res-Care, Inc. d/b/a Treasure Island Job Corps Center and jointly employed by Res-Care, Inc. d/b/a Treasure Island Job Corps Center and Alutiiq Professional Services, LLC, at the Treasure Island Job Corps Center facility located at Treasure Island, California; excluding all other employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

[13] One of the classifications included in the stipulated unit is that of instructor. Although the record discloses that the Joint-Employers require that the full-time and regular part-time instructors possess college degrees and teaching certifications, no party contends that the instructors are professional employees under the Act. Nor does the record support such a finding. Thus, the Board defines professional employees in Section 2(12) of the Act in terms of the actual work that they perform, and it is the work rather than the individual qualifications which is controlling under that section. *Aeronca, Inc.*, 221 NLRB 326 (1975). Here, there is no evidence showing that the instructors are engaged in work involving the consistent exercise of discretion and judgment or that otherwise fulfills the requirements set forth in Section 2(12), other than the requirement of possessing an advanced degree. The parties do not contend not that instructors or any other classification in the stipulated unit are professional employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also included are any employees who regularly averaged four or more hours per week for the last quarter immediately preceding the issuance of this decision. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordan Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Joint-Employers with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before October 22, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by October 29, 2004.

Dated at San Francisco, California, this 15th day of October, 2004.

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Robert H. Miller, Regional Director
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